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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1963

No. 35

ISRAEL DRESNER, AUSTIN M. WARNER, ROBERT M. BROWN, PETTY D. McKINNEY, MARTIN FREEDMAN, ARTHUR L. HARDGE, ROBERT J. STONE, WAYNE G. HARTMIRE, J. W. COLLIER, JR., RALPH L. ROY,

Petitioners,

v.

CITY OF TALLAHASSEE,

Respondent.

On Writ of Certiorari To the Circuit Court of the Second Judicial Circuit In and For Leon County, Florida

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REPLY **BRIEF FOR THE PETITIONERS**

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REPLY BRIEF FOR THE PETITIONERS

MAY IT PLEASE THE COURT:

The Respondent has failed to respond in its brief to the First and Fourteenth Amendment issues squarely raised by Petitioners.

However, Respondent has presented a Statement of the Case, which distorts the actual record, and misrepresents some of the facts. Petitioners herein attempt to set the record straight, with the view that the record in this case is an important element in arriving at a determination of the merits of Petitioners' cause.

1. "The Airport restaurant was closed for repairs (Resp. B. P. 6)."

The restaurant manager admitted that he had two reasons for closing down the restaurant (R 102) and it is clear that closing down for repairs is secondary to his reaction to Petitioners' efforts to end the discriminatory serving of meals at the air terminal restaurant.

2. "However, they (Petitioners) arrived with the avowed purpose to test **imaginary** or **imagined** discriminatory acts or practices * * * (Resp. B 8)." (Emphasis supplied)

The above statement is completely inconsistent with the record. The restaurant manager testified (R 102)

"Q. Is that restaurant divided into two sections?"
"A. Yes sir."

"Q. Are there any designations as to one or the other of those sections of the restaurant?"
"A. Yes sir."

"Q. What designations?"
"A. The lunch counter has a sign 'Colored' on it which is at the colored waiting room."

There is a plethora of other testimony (R 33-34, R 81, R 91) as to the actual existence of discriminatory acts and practices in Tallahassee, and finally, Respondent on Page 20 of its brief admits these practices by discussing **Brooks v. Tallahassee,** 202 F-Supp. 56 (N. D. Florida 1961) the case that subsequently ended segregation in Respondent's airline terminal facilities.

3. "Repairs to the restaurant * * * were not completed for several days * * * Resp. B 6 & 7)"

The restaurant manager stated that repairs were not completed at the time that the restaurant actually reopened (which was the day after Petitioners were jailed) (R 103). Coincidentally or intentionally, his testimony discloses that the restaurant was closed just for those periods when Petitioners were awaiting the opening of the restaurant to permit them to eat. The manager said (R 106)

"I closed the restaurant at 1:30 * * *

"Q. When was the next time that you opened the restaurant?"
"A. Saturday morning."

At the one-thirty referred to above by the witness, the Petitioners arrived shortly after that time and sought food. The following day was Friday, and early in the after-

noon of that day, Petitioners were unlawfully arrested. These coordinated closings were corroborated by the Eastern Airline Station Agent (R 36) and one of the Petitioners (R 143)

> 4. "Thus it can be seen that these Petitioners during the dates of June 15 and 16, 1961, held **cancelled** tickets * * * (Resp. B 7)." (Emphasis supplied)

The word "cancelled" means to make void or invalid. **Clegg v. Schvaneveldt** (Utah) 8 Pac (2d) 620, 621. At all time during Petitioners stay in Tallahassee, they held bona fide tickets from Florida to points beyond Florida, and the record is void of any evidence to the contrary.

> 5. "As the morning of June 16, 1961 progressed it became very obvious to persons of long and comprehensive experience in the law enforcement field, that the continued activity of the Petitioners in the airport waiting room was tending to create the very clear and present danger of a riot (Resp. B 8)."

Petitioners were not involved in any activity, they were merely sitting or standing in the terminal (R 84). As to the tendency for this activity to create a riot, respondent had heretofore stated (Resp. B 6)

> "* * * Sufficient protection was provided for Petitioners **at all times** * * *" (Emphasis supplied)

It is certainly true that the Respondent had provided

protection on a previous occasion (R 89). Inasmuch as there is no testimony whatsoever in the record of this case of a breakdown of law enforcement, one must assume that there was sufficient protection to quell a breach of the peace or prevent any harm to the community at Respondent's airport. However, Respondent again repeats their assurances of adequate protection when it states:

> "During the entire period Petitioners were in Tallahassee, they were adequately protected from any hostile acts by any person or persons (Resp. B 8)."

Assuming arguendo that respondent's statement is true, upon whom was the breach of the peace to be visited? Certainly not on Petitioners who were well guarded; but then if a breach of the peace was imminent from some other quarter, is it not implicit that Respondent's law enforcement officers had a duty to arrest those threatening to breach the peace?

> In **Edwards v. South Carolina** 372 U.S. 229; 31 Law Week 4225 (1963), this Court points out: "Police protection at the scene was at all times sufficient to meet any forseeable possibility of disorder".
>
> In **Wright v. State of Georgia** 83 S. Ct. 1240 (1963) where a group of Negroes were arrested for playing basketball in the park, this Court said: "* * * the possibility of disorder by others — could not justify exclusion of the Petitioners from the park. Thus Petitioners could not constitutionally be convicted for refusing to obey the officers."

IN REPLY TO ARGUMENTS OF RESPONDENT

I

While much of Respondent's brief dealt on matters not contained in this record (Resp. B 11, 15, 18-19), there remains several matters that require clarification: Respondent cites (Resp. B 11) **Regina v. Vincent,** 9 Carrington and Payne (English 1839) and **Regina v. Neale,** Carrington v. Payne 431 (English 1839) presumably to establish the common law of unlawful assembly. Assuming arguendo that these cases represent the common law, it is imperative to point out that the test of unlawful assembly as set forth in these cases by Respondent, includes the words

> "* * * assemble **under such circumstances** * * * as are likely to produce danger to the tranquility and peace of the neighborhood." (Emphasis supplied)

In the case of **Regina v. Vincent, Supra,** the factual circumstances clearly indicate a meeting of persons who were either meeting unlawfully, riotously or tumultuously. The Defendant's in that case belonged to a group called the "Chartists" who met in the town of Newport to talk of rebellion against the crown and with considerable show of violence. In the case of **Regina v. Neale, Supra,** the Defendants threw stones, used bludgeons and knives. The Court in summing up said, inter alia:

> "All these cases must depend on their own circumstances; and you would have to say in each, whether, under the particular circumstances,

> the magistrates were justified in resorting to the means they did."

It is such factors as these that clearly indicate that the common law version of unlawful assembly impliedly authorizes the usage of the words unlawful, riotous or tumultuous.

Thus in the City of Tallahassee ordinance (Resp. B 3) it is clear that the Petitioners must either assemble unlawfully, riotously or tumultuously, and that such words when used in this restricting sense is akin to the common law finding that, "the accused assembled **under such circumstances** as are likely to produce danger to the tranquility and peace ***." (Emphasis supplied)

The respondent (Resp. B 14) has endeavored to set forth the elements of the unlawful assembly but either by neglect or inadvertance has failed to include the requirements as setforth above.

In **Nesmith v. Alford** 318 F 2d 110, 120 (1963) the appellants had brought suit for false arrest, false imprisonment and malicious prosecution against certain police officers of the City of Montgomery, Alabama. The appellants who were of the white race, had been arrested by the appellees for eating lunch with some Negro citizens of Montgomery and had been arrested and charged with disorderly conduct. The Circuit Court of Appeals stated that:

> "*** there is no single Alabama case to indicate that the suspected threat of mob violence at the hands of law breakers may be avoided by ar-

resting those whose actions are perfectly peaceful and legally and constitutionally protected merely because such lawful and peaceful conduct provocatively incites the incipient mob."

"Great latitude is, and must be extended to states in the determination of what conduct constitutes a crime or in ascertaining guilt or innocence, but before there may validly be the imposition of criminal sanctions in the form of fine or imprisonment, or both, there must be a crime defined and a crime committed."

In conclusion Petitioners contend that there is no evidence as to any unlawful, riotous or tumultuous behavior on the part of the Petitioners. Indeed there is no evidence whatsoever of the existence of any crime committed by Petitioners.

II

With respect to Respondent's contentions, in reply to Petitioners claim that their conviction for unlawful assembly constituted a violation of their rights of freedom of speech and assembly; Petitioners submit that the record shows no interference with the normal business of the terminal, or the airlines, or other passengers; and as witness Cannady, the Eastern Airlines Station manager, stated (R 38)

"We have no complaint with their actions***.

They were very polite and co-operative ***."

That with regard to the law as to Petitioners rights in this instance, the Respondent's brief is barren of any legal argument in this regard, and Petitioners are of the opinion that the cases presented in their behalf in their original brief, adequately represent the existing law on this issue.

III

With respect to Respondent's argument that there were no denials of equal protection of the laws as guaranteed by the Fourteenth Amendment, Petitioners contend in their so-called "pointed answer" that other persons obeyed the directions of the authorities conflicts with Respondent's reasons for Petitioners arrest. Respondent's Chief of Police testified:

> "It was generally talked around the terminal that there was possibly going to be some violence if the Defendants continued to stay there. I never or don't know that any one particular person told me they were going to do anything but it was generally talked about (R 44)."

If indeed Respondent's knew (as they allege in their brief Resp. B 20) that all persons were going to obey their directives, then no lawful reason whatsoever existed for them to be concerned with Petitioners. Cf. **Wright v. State of Georgia, Supra.**

CONCLUSION

For the foregoing reasons Petitioners pray that the judgments below be reversed, that the convictions be set aside and that the charges be quashed and dismissed.

Respectfully submitted

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BY_____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief for the Petitioners has, pursuant to Rule 33 (1) of the Rule of the Supreme Court of the United States, been served by air mail upon EDWARD J. HILL, Attorney for Respondent, 216 East Jefferson Street, Tallahassee, Florida, Roy T. Rhodes, P. O. Box 128, Tallahassee, Fla., Rivers Buford, Jr., 404 Midville Moor Bldg., Tallahassee, Fla., this ____ day of October, 1963.

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